

2001

# Beverly Ann Burge v. Gary Thomas Facio : Brief of Appellant

Utah Court of Appeals

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Connie Mower; Attorney for Plaintiff/Appellee.

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IN THE UTAH COURT OF APPEALS

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BEVERLY ANN BURGE,

Plaintiff/Appellee,

vs.

GARY THOMAS FACIO,

Defendant/Appellant.

Appeal No. 20010442-CA

District Court No 924903403

Priority 15

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BRIEF OF THE APPELLANT

---

from the Third Judicial District Court of Salt Lake County  
State of Utah, Judge William Bohling

---

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**FILED**

**COURT OF APPEALS**

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h) 1953 as amended.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

The issues presented for review are as follows.

1. Whether the district court erred when it found that the parties had not reconciled after living together as husband and wife for four years and enforced the terms of the Order of Separate Maintenance, including the executory provisions.
2. Whether the trial court erred in finding that the parties because they did not specifically rescind the agreement, intended that the agreement remain in effect despite the evidence that the terms of the agreement were never followed.
3. Whether the trial court erred when it found that the Order of Separate maintenance was an arms length agreement.

The standard of review for property distribution in divorce actions is the Abuse of Discretion standard. Sorensen v. Sorensen, 769 P2d. 820 (Utah App. 1990). The trial court's findings in a property distribution will not be disturbed unless they are clearly erroneous and against the clear weight of the evidence or unless the court reaches a definite firm conviction that a mistake was made. Dunn v. Dunn, 802 P.2d 1314

(Utah App. 1990), Weston v Weston, 773 P.2d 408 (Utah App. 1990).

This standard is applicable to all three issues.

### **DETERMINATIVE STATUTE**

The issues presented involve primarily case law. The only determinative statute is Utah Code Annotated § 30-4-3(3).

The court may change the support or maintenance of a party from time to time according to circumstances, and may terminate altogether any obligation upon satisfactory proof of voluntary and permanent reconciliation. An order or decree of support or maintenance shall in every case be valid only during the joint lives of the husband and wife.

### **STATEMENT OF THE CASE**

1. The parties were married for 25 years. The parties were married March 16, 1974 in Wellington Ohio and were divorced in March of 1999. Beverly never took Gary's last name and has always been known by the last name of Burge not Facio. R. 13,17,246,247.
2. Beverly filed for divorce in 1981, and again filed for divorce in 1989 and again in 1992. The divorce filing in 1992 was eventually converted to a separate maintenance agreement and further amended to a divorce complaint on October 7,1997. The parties were divorced on March 18, 1999. R. 27. Tr 17-18, Tr. 30,146.
3. The parties separated in 1991 and in 1992, Beverly's attorney, Louise Knauer, drafted a complaint for separate maintenance. Gary was unrepresented by counsel and signed a consent and waiver of service. The Order for Separate maintenance incorporated all of the terms of the



complaint and was signed August 27, 1992. R.1-7,R 9-10, R.19-24 Tr. 31.

4. The parties owned two pieces of real property;there was a house on E Street in the Avenues and a house on Live Oak Circle in Holladay. Tr.

32. The E Street home was sold and the proceeds split between the parties. The Live Oak home was purchased in 1989 and titled in Beverly's name only. Beverly was awarded the Live Oak home and all of her retirement accounts. R. 19-20, Tr. at 32, 116.

5. Gary moved back in to the marital home in late 1993. Tr. 49-50, 115,154, R. 244.

6. After Gary moved back in the home, the child support and other financial terms of the separate maintenance agreement were not followed or enforced. Tr 53, 118-120.

7. The children's medical expenses were never paid evenly between the parties. Tr. 120.

8. Gary never obtained the life insurance specified in the separation agreement or paid the debts he was ordered to pay. Tr. 43, 45.

9. When Gary moved back in the home, Beverly resumed wearing her wedding ring after Gary put the ring back on Beverly's hand. Tr. 174.

10. The parties lived as husband and wife after Gary moved back in the home. Tr. 162.

11. Beverly never attempted to collect the child support from Gary after he moved back in the home because in her heart she was hoping that everything would work out. Tr. 118-119.
12. The parties maintained one joint stock account after Gary moved back in. Tr. 47.
13. After the separation agreement was signed in 1992, the parties again lived together in the marital home from November 1993 until late September of 1997. R. 244.
14. Beverly and the children used Gary's airline flight benefits after Gary moved back into the house. Beverly traveled as Gary's wife and was listed as his wife on the airline computer system. Tr. 137,171-172.
15. Beverly has a pension plan and a thrift savings plan through her employment and an IRA. Tr. 61-62.
16. Gary moved back out of the home in September of 1997. Tr. 54.

### **SUMMARY OF THE ARGUMENT**

After the parties signed the separation agreement in 1992, it is undisputed that the parties again lived together in the marital home from 1993 until 1997, a period of nearly four years. Gary's argument is that the couple reconciled during the period of 1993 thru 1997 and as a result of the reconciliation the separation agreement was voided. The trial court found that the terms of the separate maintenance agreement regarding property division were valid and would be enforced; that no

reconciliation had occurred to void the agreement between the parties during the 4 years that the parties again lived as man and wife, and that the agreement was an arms length transaction between represented parties. Gary was awarded no equity in the real property, no alimony, no furniture, and no interest in Beverly's retirement accounts. The trial Court erred when it found that the reconciliation was only "provisional" or "attempted".

The trial court disregarded the evidence presented that virtually none of the provisions of the separate maintenance agreement were enforced after Gary moved back in, that the parties lived as husband and wife again for a 4 year period, that during the 5 year period between the time of entry of the separate maintenance agreement was entered in 1992 and the final separation in 1997 the parties lived separately for only one out of those five years.

The trial court found the agreement to be an arms length transaction and that Gary had consulted with attorney Brian Barnard despite testimony to the contrary, letters written from Beverly's counsel directly to Gary and an affidavit from Mr. Barnard denying that he consulted with Gary on the matter.

## **ARGUMENT**

**The trial court erred when it found that the parties had not reconciled after living together in the marital home with their children for nearly four years.**

“It appears to be well settled that reconciliation of husband and wife and resumption of marital relations for any period of time will render a previous contract and settlement of property rights void” Cox v Cox, 659 So2d 1051,1053 (Fla. 1995), quoting Weeks v. Weeks 197 So. 393 (Fla. 1940) (emphasis added). In Cox, the husband, James Cox, married his wife, Kimi Cox, in 1978 and eventually divorced 10 years later while serving in the military in Guam. Id. at 1052. The settlement agreement provided for child support and distributed the parties’ property. Id. The agreement was silent as to the effects remarriage or reconciliation would have upon the agreement. Id. The parties remarried in 1989 and James Cox filed for divorce in 1990. Id.

The trial court found that Kimi Cox was bound by the Guam settlement agreement and was therefore not entitled to an interest in James Cox’s future military retirement benefits Id. On appeal, the District Court of Appeal certified the following question to the Florida Supreme Court: “[d]oes reconciliation or remarriage void a property settlement agreement or separation agreement as a matter of law? Id. The court held that “reconciliation or remarriage abrogates the executory provisions of a prior marital settlement agreement unless there is an explicit statement in the agreement that the parties intended otherwise.” Id. at 1054. The court indicated that this holding is the majority view being followed by of 6 the 7 ‘sister’ states of Florida. Id.

The Cox court cited a public policy argument in favor of abrogation

found in Brazina v. Brazina, 558 A2d. 69 (N.J. Super. Ch. 1989).

The philosophy underpinning the theory of abrogation is that, since the policy of courts is to encourage and strengthen the bond of marriage, it is the presumed intent of the parties at the time of the reconciliation to resume the marital relationship in all respects and abrogate any prior agreements restricting or inhibiting the rights of one of the spouses unless they indicate otherwise at the time of the reconciliation.

...However, it is recognized that the parties as well as third parties, should have the right to rely upon the validity of *executed* portions of the property settlement agreement. To hold otherwise could create havoc not only for the parties themselves but for third parties as well who would be reluctant to contract with a separated but undivorced person for fear that reconciliation may have occurred which could have created in the other spouse legal interest in an asset even though that spouse relinquished all rights in that asset in an earlier property agreement.

The Brazina case is on point with many of the facts before this court. The Mark and Donna Brazina were married in May of 1981 and separated in March 1985. Id. A property settlement agreement was signed in July 1985 whereby the wife conveyed her interest in the home to the husband who had purchased the home in 1982 with his father's assistance. Id. at 70-71. The wife moved back into the home in April of 1986. Id. at 71. No agreement was made to set aside the conveyance of the home. Id. No discussion was had as to what effect the reconciliation would have upon the separation agreement. Id. The husband continued to pay weekly child support of \$40 to the wife and paid all of the home expenses whereas the wife paid for food, household incidentals and clothing for her and their child. Id. The parties separated in August of 1988, less than two and a half years after moving back into the home, and a divorce followed. Id. The wife claimed that the property settlement

was abrogated by the reconciliation whereas the husband claimed there never was a reconciliation but rather a platonic relationship where they lived together as friends for their mutual benefit. Id. The husband contended that even if there was a reconciliation, it should not have an effect on the property settlement agreement unless the parties had expressly agreed to alter or rescind it. Id.

The Brazina court was concerned that legal consequences not be imposed upon spouses who are separated and are attempting to resolve their differences through “trial reconciliations”. The Brazina court proceeded to answer the question of what constitutes a reconciliation and offered a summary of the case law on the subject. Two acts of sexual intercourse was found to only be an attempt to reconcile and did not constitute a reconciliation. Cooke v. Cooke, 237 S.E. 2d 323 (N.C. App.1977). Ten days in the marital home was not enough for a reconciliation. Camp v. Camp, 331 S.E.2d 163 (N.C. App.1985). However, in North Carolina, when the parties have lived together in the marital home for eight months they are deemed reconciled as a matter of law whether or not they engaged in conjugal relations. Matter of Estate of Adamee, 230 S.E. 2d 541 (N.C. 1976). Other courts have found reconciliation after only three months. See Miller v. Miller, 616 P2d 313 (Mont. 1980). Appellant has found only one case that has held that a time period exceeding more than a few months long was not a reconciliation. See Wood v Wood, 309 A.2d 103 (D.C. 1973) Wood was

decided prior to any of the other cases cited and has not been followed. In Bourne v. Bourne, 521 S.E.2d (Ct. App. 1990) despite a reconciliation, the court upheld some provisions in a separation agreement because the settlement agreement specifically provided that the agreement would remain in full force if the parties reunited. Id. Nevertheless, the court refused to uphold a provision of the contract where the parties mutually agreed not to support each other in the future even after a reconciliation because it was void as a matter of public policy. Id. at 646.

The Brazina court was satisfied that since the parties had resided together for two years in the marital home with their child, they had passed the “trial period” or the “attempt to reconcile stage” and had in fact reconciled. Id. at 72. The court held that the executed portions of the agreement were valid which meant that the wife had no *legal* interest in the marital home. Id. at 73 [emphasis added]. The court followed In Re the Marriage of Reeser, 635 P.2d 930 (Colo App.1981), and held that the wife had an *equitable* interest in the marital home from the time of reconciliation until divorce and was entitled to a share of the equity accumulated during that period. Id. at 74 [emphasis added]. This appears to be the majority view.

A minority view, that equity accruing on real estate remains separate property after a reconciliation was the holding in Kaminsky v. Kaminsky, 364 S.E. 2d 799 (W.Va. 1987). The facts in this case are different than the case before this court in two respects. First, the

property was actually conveyed, and secondly, one of the parties had sold the property and invested the proceeds into other investments. Id. at 801. The Live Oak home was always titled in Beverly's name only. This case has not been followed in any other jurisdiction.

In Reeser, the parties had executed a separation agreement that whereby the husband conveyed his joint interest in the real property to the wife. Id. at 930. The parties reconciled only a month later and lived together until divorcing five years later. Id. On appeal, the court found that the husband was entitled to an interest in the amount of appreciation that accrued on the home during the period of reconciliation after the wife became the sole owner of the home. Id. at 933. In Reeser, as in the case at bar, there was also testimony that the husband had an inability to manage his funds. Id. The court also found that although the property settlement regarding the furniture was executed prior to reconciliation, the provision had been abrogated. Id. at 932.

This court should hold that, as a matter of law, where the parties resided in the marital home and lived as husband and wife for more than three years, they have reconciled and prior separation agreements are abrogated as to the executory portions.

**The trial court erred when it ruled that there was no mutual intent to reconcile or to abrogate the agreement.**

Appellants position is that after 4 years of resumption of marital relations intent is not required. Nevertheless, there was mutual intent to reconcile and to abrogate the terms of the separation agreement.



The actions of Gary and Beverly did not indicate an intent to enforce the agreement but rather an intent to abandon the agreement. Beverly stated that she did not think of Gary as simply a roommate. Tr. 54. Gary testified that they lived as husband and wife. Tr. 162. The ongoing terms of the agreement itself were never enforced. Gary never paid regular child support or the children's medical expenses after moving back in the home and Beverly never attempted to collect it. Gary helped around the house, he took the kids to school. The parties and the children took trips using Gary's airline benefits.

Reconciliation is the voluntary resumption of marital relations in the fullest sense. It means something more than mere resumption of cohabitation and observance of civility and comprehends a fresh start and genuine effort by both parties to avoid the pitfalls originally causing separation. Black's Law Dictionary 881 (Abridged 6<sup>th</sup> ed. 1991). At least one state has defined the term "Resumption of marital relations" as the "voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." N.C. Gen Stat. Sec 52-10.2 (1991).

In Schultz v. Schultz, 420 S.E. 2d 186 ( N.C. App. 1992), the parties, Elizabeth and Gerald Schultz entered into a consent agreement regarding the marital home and alimony in March of 1984. Id. Gerald agreed to convey the house, make the mortgage payments on the house

and pay \$400 in alimony. Id. Gerald conveyed the house but only made one alimony payment. Id. The parties separated for over 6 years until Gerald moved back into the marital home in June of 1990. Id. Only four months later, Elizabeth asked Gerald to leave the home. Gerald refused to leave and filed to void the consent judgment because the parties had reconciled. Id. The trial court determined that the parties had not reconciled based upon the following finding of fact:

16. Although there was an intent on behalf of the defendant to reconcile, the plaintiff intended to reconcile only on the condition that the defendant would change his actions and personality traits which had originally caused the discord between the parties. The evidence shows that the defendant did not change his behavior, and that there were problems from the day that the defendant returned until the present. There was no mutual intent to establish a permanent reconciliation. Rather, there was a conditional intent on behalf of the plaintiff and that condition has not been fulfilled. Consequently, no reconciliation occurred.

Id. at 187.

In the case at bar, the following similar finding of fact was made by the trial court judge.

There was a ---it would appear to the court from the facts that were presented, there was a tentative, conditional attempted reconciliation based on the respondent's performance of certain conditions. Those conditions were outlined in part on the letter of 32 exhibit B, and other matters as testified to by the Court.

The respondent testified in some candor that as he described it, "it's still a work in progress." In other words he never did perform any of the conditions that he promised as a condition for the reconciliation. The condition was never met. It is clear that the parties never petitioned the Court to return the agreement. It is clear that the parties following the---what the Court would call a provisional and attempted reconciliation.

Tr. at 191.

The rule established in Adamee and followed in Schultz is that if the facts are not disputed that the parties resumed marital relations, then it is error to examine mutual intent. Id. at 190. The Schultz court found that because it was undisputed that Gerald Schultz kept his automobile at the residence, lived in the residence continuously; moved his belongings into the house; paid the utility bills and other joint bills; mowed the lawn, and kept his animals at the house. Id. It was also undisputed that Elizabeth did his laundry, went shopping, worked in the yard and had sexual relations. Id. These facts alone, absent any intent, over only a four month period, were sufficient for the court to find that a reconciliation voided the executory portions of the agreement, specifically the obligation to pay alimony in the future. Many of those same facts exist between Gary and Beverly-over a four year period.

The trial court appeared to hold that because the reconciliation between Gary and Beverly eventually failed and ended in a divorce- that there never was a reconciliation- it was only a “provisional”, “attempted” reconciliation. This holding is contrary to every reported case on the subject and has no basis in law. A reconciliation does not need to be successful to be valid. All of the cases cited in this brief involved reconciliations that eventually failed.

The difficulty in determining the intent of parties as to reconciliation was explained in the Yeich v Yeich, 399 S.E. 2d 170 (Va. App. 1990). The trial court found that although the parties had lived

together for four years after signing a settlement agreement, since there were no words, actions, or agreements by the parties after reconciliation that demonstrated an intent to abrogate any provision of the agreement that it remained in force. Id. at 172. The criticism of this “factual proof of intent” approach is that if the parties clearly expressed their intent concerning the effect of reconciliation on the agreement, they would re-open old wounds that had only begun to heal. Id.

The Yeich court held that

[t]he majority view that we adopt is premised on the assumption that at the time the parties executed the separation agreement they intended to live separate and apart; when they reestablished a matrimonial home they thereby necessarily intended to void those portions of the agreement that remain executory (emphasis added).

Id. at 173.

There was testimony from Beverly that after Gary moved back in 1993, the parties did not resume a joint account and that they tried to keep their finances separate. This is not surprising since, in accordance with the definition, reconciliation is a “fresh start” and an attempt by the parties to avoid the “pitfalls originally causing the separation” Black’s, *supra*.

Beverly testified that she maintained a separate checking account after the separation agreement was entered. It is understandable that when parties reconcile, they will make some changes in their marriage in order to correct some of the pitfalls and hopefully not repeat the mistakes

that caused the separation in the first place. It is not surprising, indeed it would be more surprising, if Beverly did not take more control over the financial matters in the household since Gary's financial status was a major issue leading to the past separations.

**There is no requirement that the parties affirmatively cancel the agreement.**

The trial court also indicated that because the parties did not return to court to cancel the separation agreement the agreement would remain valid notwithstanding the parties' actions. The opposite view, that the separation agreement is abrogated unless the parties specifically indicate otherwise is the holding in all of these cases. Some courts have gone further and held that even if the parties agree after a reconciliation that neither party is obligated to support the other party in the future, the agreement will be void as against public policy. Bourne, 521 S.E.2d 519,521.

Utah Code Annotated § 30-4-3(3) states

The court may change the support or maintenance of a party from time to time according to circumstances, and may terminate altogether any obligation upon satisfactory proof of voluntary and permanent reconciliation. An order or decree of support or maintenance shall in every case be valid only during the joint lives of the husband and wife.

Utah's statute, while allowing the parties to alter or terminate the agreement, does not require that the parties affirmatively do so and

specifically grants the court the authority to terminate the agreement upon proof of reconciliation.

**The trial court erred when it failed to equitably divide the executory portions of the separation agreement between the parties.**

The Appellants position, consistent with the cases presented is that the previously executed portions of the agreement are enforceable and should not be disturbed. The portions of the agreement that remain executory however should be abrogated by the reconciliation. The portions of the agreement that remain executory are Beverly's retirement and savings plans from the Post Office, her IRAs, the equity in the Live Oak home that accumulated between 1993 and 1999, alimony, and the furniture and other personal property. The equity accruing in the home is executory and subject to division. Schultz, Reeser, Brazina, *supra*. Future retirement benefits are by definition executory. Cox v. Cox, 659 So. 2d 1051, 1054-55. Separation agreements regarding furniture are abrogated upon a reconciliation. Reeser, 635 P.2d. 930, 932.

#### REAL PROPERTY

Based upon the reconciliation, Gary should be entitled to share of the equity that accrued at the Live Oak home between the period of reconciliation and the divorce. Two appraisals exist in the record. Exhibits 34 and 35. The first values the home at \$135,000 on September 4, 1992, one month after the separation agreement was signed. The second was conducted in February of 1999 at the time of the divorce and

at appraised the home at \$216,000. Gary should be entitled to an equitable share of the \$81,000 in equity.

#### BEVERLY'S RETIREMENT

Beverly is still employed with the Postal Service. Since all of the retirement benefits are executory, the separation agreement, if abrogated through reconciliation, should have no effect upon this marital asset. Accordingly, Gary should be entitled to an equitable share of all of Beverly's retirement benefits and IRA's, for the entire 25 years of the marriage.

#### ALIMONY

The separation agreement waived alimony for either party. If the separation agreement is abrogated by reconciliation, Gary should be entitled to alimony for the entire length of the marriage minus the separation period when the separation agreement may have been valid.

#### FURNITURE

The personal property division made in the separation agreement would also be an executory provision. Once Gary moved back in the marital home and reconciled, the personal property and furniture again became marital property.

**The trial court erred when it found that Gary was represented by counsel during the separation agreement.**

The trial court found that Gary had consulted with Brian Barnard regarding the separate maintenance action R. 355. This finding is not

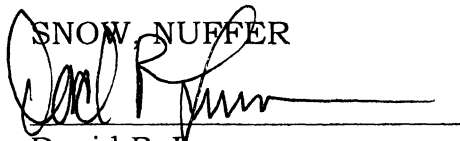
supported by the evidence or the record. R. 11, Exhibit 42. Mr. Barnard never appeared in the case and provided a statement that he never consulted with Gary on the matter. Louise Knauer sent correspondence directly to Gary rather than to Mr. Barnard notwithstanding Beverly's testimony that she discussed with Ms. Knauer that Gary was represented by Mr. Barnard. Exhibit 39 Tr. 114.

Because Gary was not represented by counsel, it was error to conclude that the agreement, drafted by Beverly's attorney was necessarily an arms length transaction.

### **CONCLUSION**

Based upon the prevailing case law regarding reconciliation, and the evidence presented at trial, it is clear that the trial court erred when it failed to find that the parties had reconciled. The trial court erred by failing to abrogate the executory portions of the Order for Separate Maintenance. Gary should have been awarded a share of the equity in the home, an interest in Beverly's retirement plans and accounts, alimony, and additional furniture and personal property. As a result of the trial courts error, Gary Facio has taken nothing from a marriage that lasted 25 years.

ATED this 14th day of August, 2001.

SNOW NUFFER  
  
David P. Larson



**CERTIFICATE OF SERVICE**

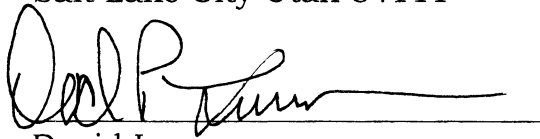
I certify that I mailed a true and correct copy of the BRIEF OF APPELLANT to be hand delivered this 14<sup>th</sup> day of August, 2001 to the following:

Original and 7 copies to:

Clerk, Utah Court of Appeals  
450 S. State St.  
Salt Lake City, Utah 84114

2 copies to:

Connie Mower  
43 East 400 South  
Salt Lake City Utah 84111

A handwritten signature in black ink, appearing to read "David Larson", is written over a horizontal line.

David Larson  
Attorney for Appellant

## **ADDENDUM CONTENTS**

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**APPRAISAL OF REAL PROPERTY**

**LOCATED AT:**

2869 E. Live Oak Circle  
Lot 9 Spring Creek Subdivision  
Salt Lake City, Utah 84117

**FOR:**

Beverly A. Burge  
2869 E. Live Oak Drive, Salt Lake City, UT 84117

**AS OF:**

February 12, 1999

**BY:**

Raymond K. Knudson

valued  
~~135K~~  
216K

Property Address 2869 E Live Oak Circle		City Salt Lake City		State Utah		Zip Code 84117	
Legal Description Lot 9 Spring Creek Subdivision		County Salt Lake					
Assessor's Parcel No 22023520060000		Tax Year 1997		R E Taxes \$ 1,695 74		Special Assessments \$ 0 00	
Borrower N/A		Current Owner Beverly A Burge		Occupant <input checked="" type="checkbox"/> Owner <input type="checkbox"/> Tenant <input type="checkbox"/> Vacant			
Property rights appraised <input checked="" type="checkbox"/> Fee Simple <input type="checkbox"/> Leasehold		Project Type <input type="checkbox"/> PUD <input type="checkbox"/> Condominium (HUD/VA only)		HOA \$ N/A /Mo			
Neighborhood or Project Name		Map Reference 7160'90Cen		Census Tract 1109			
Sale Price \$ N/A		Date of Sale N/A		Description and \$ amount of loan charges/concessions to be paid by seller N/A			
Lender/Client Beverly A Burge		Address 2869 E Live Oak Drive, Salt Lake City, UT 84117					
Appraiser Raymond K. Knudson		Address 774 East 2100 South, Salt Lake City, Utah 84106					
Location <input type="checkbox"/> Urban <input checked="" type="checkbox"/> Suburban <input type="checkbox"/> Rural		Predominant occupancy <input checked="" type="checkbox"/> Owner 95 <input type="checkbox"/> Tenant 5 <input type="checkbox"/> Vacant (0-5%) <input type="checkbox"/> Vac (over 5%)		Single family housing PRICE \$(000) 125 Low 10 High 80		Present land use % One family 95 2-4 family 2 Multi-family 2 Commercial 1	
Built up <input checked="" type="checkbox"/> Over 75% <input type="checkbox"/> 25-75% <input type="checkbox"/> Under 25%		Growth rate <input type="checkbox"/> Rapid <input checked="" type="checkbox"/> Stable <input type="checkbox"/> Slow		Property values <input type="checkbox"/> Increasing <input checked="" type="checkbox"/> Stable <input type="checkbox"/> Declining		Land use change <input checked="" type="checkbox"/> Not likely <input type="checkbox"/> Likely <input type="checkbox"/> In process	
Demand/supply <input type="checkbox"/> Shortage <input checked="" type="checkbox"/> In balance <input type="checkbox"/> Over supply		Marketing time <input type="checkbox"/> Under 3 mos <input checked="" type="checkbox"/> 3-6 mos <input type="checkbox"/> Over 6 mos		Predominant 175 30			
<b>Note: Race and the racial composition of the neighborhood are not appraisal factors</b> Neighborhood boundaries and characteristics 4500 South on the North, I-215 on the East, 6200 South on the South and Holladay Blvd on the West							
Factors that affect the marketability of the properties in the neighborhood (proximity to employment and amenities, employment stability, appeal to market etc) The subject property is located in a mature residential neighborhood in the Holladay Area of the Salt Lake Valley. The homes and yards are well maintained. The area is centrally located in the valley with churches, schools, shopping and other amenities within one mile. The major employment centers are from 10-20 miles away with freeway access 1 mile to the East.							
Market conditions in the subject neighborhood (including support for the above conclusions related to the trend of property values, demand/supply, and marketing time -- such as data on competitive properties for sale in the neighborhood, description of the prevalence of sales and financing concessions, etc.) The current real estate market in the Utah area is healthy with low interest rates, high employment and is basically in balance with sellers and buyers operating on a level playing field with neither the buyer or the seller being able to take advantage of each other in negotiating a sales price. Normal marketing time in this neighborhood is generally between 60-120 days.							
Project Information for PUDs (if applicable) -- Is the developer/builder in control of the Home Owners Association (HOA)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Approximate total number of units in the subject project N/A Approximate total number of units for sale in the subject project N/A Describe common elements and recreational facilities N/A							
Dimensions 105x95		Site area 23 acre lot		Corner Lot <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Topography Slope to SW	
Specific zoning classification and description R-1-10 (Single Family Residential 10,000 msf)		Zoning compliance <input checked="" type="checkbox"/> Legal <input type="checkbox"/> Legal nonconforming (Grandfathered use) <input type="checkbox"/> Illegal <input type="checkbox"/> No zoning		Highest & best use as improved <input checked="" type="checkbox"/> Present use <input type="checkbox"/> Other use (explain)		Size Typical/Adequate	
Utilities Public <input checked="" type="checkbox"/> Other		Off-site improvements Type Public Private		Landscaping Typical		Shape Rectangular	
Electricity <input checked="" type="checkbox"/>		Street Asphalt <input checked="" type="checkbox"/>		Driveway Surface Asphalt		Drainage Adeq To Lot Line	
Gas <input checked="" type="checkbox"/>		Curb/gutter Concrete <input checked="" type="checkbox"/>		Apparent easements Typical Utility		View Neighborhood/Average	
Water <input checked="" type="checkbox"/>		Sidewalk None <input type="checkbox"/>		FEMA Special Flood Hazard Area <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Sanitary sewer <input checked="" type="checkbox"/>		Street lights None <input type="checkbox"/>		FEMA Zone Zone C Map Date 12/18/85			
Storm sewer <input checked="" type="checkbox"/>		Alley None <input type="checkbox"/>		FEMA Map No 490102 0316 B			
Comments (apparent adverse easements, encroachments, special assessments, slide areas, illegal or legal nonconforming zoning use, etc.) PUE over perimeter lot lines. The appraiser assumes that there are no hidden or unapparent conditions of the property, subsoil, or structures.							
GENERAL DESCRIPTION		EXTERIOR DESCRIPTION		FOUNDATION		BASEMENT	
No of Units 1		Foundation Concrete		Slab No		Area Sq Ft 1,790	
No of Stories 1		Exterior Walls Brick/Wood		Crawl Space No		% Finished 85%	
Type (Det/Att) Detached		Roof Surface Tar&Gravel		Basement Full		Ceiling Acc Tile	
Design (Style) Cotemp		Gutters & Dwnspts Yes/Alum		Sump Pump No		Walls Wood	
Existing/Proposed Exist		Window Type Single Pane		Dampness No		Floor Asph Tile	
Age (Yrs) 40 years		Storm/Screen Yes		Settlement No		Outside Entry Walkout	
Effective Age (Yrs) 15		Manufactured House No		Infestation No		Unknown	
ROOMS		Foyer Living Dining Kitchen Den Family Rm Rec Rm Bedrooms # Baths Laundry Other Area Sq Ft					
Basement		1 1 1 1 1 1 2 1		1,790			
Level 1		Area 1 Area 1 1 1 3 2 Area		1,836			
Level 2							
Finished area above grade contains 6 Rooms, 3 Bedroom(s), 2 Bath(s), 1,836 Square Feet of Gross Living Area							
INTERIOR Materials/Condition		HEATING Type FWA		KITCHEN EQUIP Refrigerator <input type="checkbox"/> None <input type="checkbox"/>		AMENITIES Fireplace(s) # 2 <input checked="" type="checkbox"/>	
Floors Hdw Crpt Vin/Average		Fuel Gas		Range/Oven <input checked="" type="checkbox"/>		Patio <input checked="" type="checkbox"/>	
Walls Panel Drywall/Avg		Condition Avg		Disposal <input checked="" type="checkbox"/>		Deck <input checked="" type="checkbox"/>	
Trim/Finish Streamline/Avg		COOLING Central Yes		Dishwasher <input checked="" type="checkbox"/>		Porch <input checked="" type="checkbox"/>	
Bath Floor Vinyl/Average		Other -0-		Fan/Hood <input type="checkbox"/>		Fence <input type="checkbox"/>	
Bath Wainscot Ceramic/Avg		Condition Good		Microwave <input type="checkbox"/>		Pool Hot Tub <input type="checkbox"/>	
Doors Hol-cor/Average				Washer/Dryer <input type="checkbox"/>		Auto Sprk Sys <input checked="" type="checkbox"/>	
Additional features (special energy efficient items, etc) Fully landscaped, rock retaining walls, large deck, and patio		The interior has lots of wood paneling, tile entryway and stone walls in entry and around fireplace and a furnace for each floor					
Condition of the improvements, depreciation (physical, functional, and external) repairs needed quality of construction, remodeling/additions, etc No external obsolescence has been observed Functional obsolescence of 4% for flat roof Physical depreciation attributable to normal wear and tear is estimated to be 15% and is based on 1% per year for the effective age of the home							
Adverse environmental conditions (such as, but not limited to, hazardous wastes, toxic substances, etc) present in the improvements on the site, or in the immediate vicinity of the subject property No adverse conditions found or noted on or near the subject property							

COST APPROACH	ESTIMATED SITE VALUE		= \$	70,000	Comments on Cost Approach (such as, source of cost estimate, site value, square foot calculation and for HUD, VA and FmHA, the estimated remaining economic life of the property): The cost approach has been derived from local building costs as per contractors as well as Marshall/Swift cost estimates.
	ESTIMATED REPRODUCTION COST-NEW-OF IMPROVEMENTS:				
	Dwelling	1,836 Sq. Ft. @ \$ 72.00	= \$	132,200	
		1,520 Sq. Ft. @ \$ 12.45	=	18,900	
	Patio/Deck/Central AC/Fireplaces	=	9,500		
	Garage/Carport	484 Sq. Ft. @ \$ 12.25	=	5,900	
	Total Estimated Cost New	= \$	166,500		
	Less	Physical Functional External			
	Depreciation	24,975	= \$	25,000	
	Depreciated Value of Improvements	= \$	141,500		
"As-Is" Value of Site Improvements	= \$	5,500			
INDICATED VALUE BY COST APPROACH		= \$	217,000		

ITEM	SUBJECT	COMPARABLE NO. 1	COMPARABLE NO. 2	COMPARABLE NO. 3
Address	2869 E Live Oak Circle 4700 S.	3377 E. Bernada Drive -4580 S.	5091 S Wander Lane -2740 E.	4521 S Westview Drive -3240 E.
Proximity to Subject		7 Blocks to NE	4 Blocks to SW	6 Blocks to NE
Sales Price	\$ N/A	\$ 192,500	\$ 222,000	\$ 220,000
Price/Gross Living Area	\$ N/A	\$ 105.54	\$ 89.52	\$ 130.33
Data and/or Verification Source	Inspection and County Records	Wasatch Front MLS #58140	Wasatch Front MLS #18068	Wasatch Front MLS #53001
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	DESCRIPTION	DESCRIPTION
Sales or Financing Concessions		New Conv. Normal Conc.	New Conv. Normal Conc.	New Conv. Normal Conc.
Date of Sale/Time		1/28/99	8/5/98	2/10/99
Location	Good	Good	Good	Good
Leasehold/Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple
Site	.23 acre lot	.32 acre lot	29 acre lot	25 acre lot
View	Neighborhood/Avg	Neighborhood/Avg	Neighborhood/Avg	Valley/Good -5,000
Design and Appeal	Contmp/Avg.	Rambler/Good	Contmp/Avg.	Rambler/Avg.
Quality of Construction	Brick/Wood/Avg	Brick/Wood/Avg.	Brick/Vinyl/Avg.	Brick/Stn/Avg. -2,500
Age	40 years	39 years	43 years	33 years
Condition	Average	Needs Work/Fair +20,000	Average	Good -7,500
Above Grade	Total : Bdrms : Baths	Total : Bdrms : Baths	Total : Bdrms : Baths	Total : Bdrms : Baths
Room Count	6 3 2	5 3 2	5 3 2	4 2 1 +3,000
Gross Living Area	1,836 Sq. Ft.	1,824 Sq. Ft.	2,480 Sq. Ft. -16,100	1,688 Sq. Ft. +3,700
Basement & Finished Rooms Below Grade	1,790SF85%Fin 2BdrBaRecDen	1824SF90%Fin BdrBaRec -1,000	748SF100%Fin BdrBaRec +7,500	1688SF100%Fin 2Bdr1.5BaRec +1,500
Functional Utility	Flat Roof	Flat Roof	Average -6,000	Flat Roof
Heating/Cooling	FWA/Central	FWA/Central	FWA/Swamp +1,500	FWA/Swamp +1,500
Energy Efficient Items	No Thermo	No Thermo	Thermo Pane -1,500	No Thermo
Garage/Carport	2-Carport	2-Carport	2-Carport	2 Deep Garage -4,000
Porch, Patio, Deck, Fireplace(s), etc.	Deck/Patio 2 Fireplaces	Deck/Patio 2-Fireplace	NoDeck/Patio +1,500 1-Fireplace +2,500	No Deck/Patio +1,500 2-Fireplace
Fence, Pool, etc.	Full Ldsp	Full Ldsp	Full Ldsp	Full Ldsp
	Hot Tub	No Hot Tub +1,500	No Hot Tub +1,500	No Hot Tub +1,500
Net Adj. (total)		⊗ + ⊖ - \$ 20,500	⊗ + ⊗ - \$ 600	⊗ + ⊗ - \$ 5,300
Adjusted Sales Price of Comparable		\$ 213,000	\$ 221,400	\$ 214,700

Comments on Sales Comparison (including the subject property's compatibility to the neighborhood, etc.): The land value is typical for the subject's market area and has been derived by abstraction. All sales conform to the typical FNMA guidelines. The adjusted sale prices range from a low of \$213,000 to a high of \$221,400. All sales equally support a mid range value for an estimated market value of \$216,000.

ITEM	SUBJECT	COMPARABLE NO. 1	COMPARABLE NO. 2	COMPARABLE NO. 3
Date, Price and Data Source, for prior sales within year of appraisal	None	None	None	None
	Owner	Wasatch Front MLS	Wasatch Front MLS	Wasatch Front MLS

Analysis of any current agreement of sale, option, or listing of subject property and analysis of any prior sales of subject and comparables within one year of the date of appraisal: The subject has not been listed or sold during the last 12 months.

## INDICATED VALUE BY SALES COMPARISON APPROACH

\$ 172,000

INDICATED VALUE BY INCOME APPROACH (if Applicable) Estimated Market Rent \$ N/A /Mo. x Gross Rent Multiplier N/A = \$ N/A

This appraisal is made ☒ "as is" ☐ subject to the repairs, alterations, inspections or conditions listed below ☐ subject to completion per plans & specifications

Conditions of Appraisal:

Final Reconciliation: The cost approach is \$217,000. The market approach \$216,000. The income approach has been considered however no rental data available to determine value via the income approach. Weight is given to the market approach.

The purpose of this appraisal is to estimate the market value of the real property that is the subject of this report, based on the above conditions and the certification, contingent and limiting conditions, and market value definition that are stated in the attached Freddie Mac Form 439/FNMA form 1004B (Revised 6/93).

I (WE) ESTIMATE THE MARKET VALUE, AS DEFINED, OF THE REAL PROPERTY THAT IS THE SUBJECT OF THIS REPORT, AS OF February 12, 1999 (WHICH IS THE DATE OF INSPECTION AND THE EFFECTIVE DATE OF THIS REPORT) TO BE \$ 216,000

APPRAISER:

Signature  
Name Raymond K. Knudson

Date Report Signed February 12, 1999

State Certification #

Or State License # RA00053742

SUPERVISORY APPRAISER (ONLY IF REQUIRED):

Signature  
Name J Martell Bodell SRA

Date Report Signed February 12, 1999

State Certification # CR00037499

Or State License #

☐ Did ☒ Did Not  
Inspect Property

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**APPRAISAL OF REAL PROPERTY**

**LOCATED AT:**

2869 EAST LIVE OAK CIRCLE  
LOT 9 SPRING CREEK SUB 6128-2395  
SALT LAKE CITY, UTAH

**FOR:**

CROSSLAND MORTGAGE  
4516 SOUTH 700 EAST; MURRAY, UTAH 84107  
REFINANCE: BEVERLY BURGE

**AS OF:**

4 SEPTEMBER 1992

**BY:**

FRED W. HOYER & GERALD B. HIGGS, ASA

*Valued  
135K*

*137.5*

APPRAISAL PROFESSIONALS

4 SEPTEMBER 1992

APPRAISAL PROFESSIONALS  
8701 GLIDER LANE  
SANDY, UTAH 84093

Ms. Char Golay  
Crossland Mortgage  
4516 South 700 East  
Murray, Utah 84107

Dear Char,

Pursuant to your request, we have prepared an appraisal report of the property captioned in the "Summary of Salient Features" which follows.

The accompanying report is based on a site inspection of improvements, investigation of the subject neighborhood area of influence, and review of sales, cost, and income data for similar properties.

This appraisal has been made with particular attention paid to applicable value-influencing economic conditions and has been processed in accordance with nationally recognized appraisal guidelines.


The value conclusions stated herein are as of the effective date as stated in the body of the appraisal, and contingent upon the certification and limiting conditions attached.

Please do not hesitate to contact me or any of my staff if we can be of additional service to you.

Respectfully,



FRED W. HOYER, RA39981  
STATE REGISTERED APPRAISER  
ASSOCIATE APPRAISER



GERALD B. HIGGS, ASA, CG37266  
STATE CERTIFIED APPRAISER  
CHIEF CHECK APPRAISER

## SUMMARY OF SALIENT FEATURES

<b>Subject Address</b>	2869 EAST LIVE OAK CIRCLE
<b>Legal Description</b>	LOT 9 SPRING CREEK SUB 6128-2395
<b>City</b>	SALT LAKE
<b>County</b>	SALT LAKE
<b>State</b>	UTAH
<b>Zip Code</b>	84117
<b>Census Tract</b>	1109
<b>Map Reference</b>	S.E.

<b>Sale Price</b>	\$ REFINANCE
<b>Date of Sale</b>	SEPTEMBER 1992

<b>Borrower / Client</b>	BEVERLY BURGE
<b>Lender</b>	CROSSLAND MORTGAGE

<b>Size (Square Feet)</b>	1,738
<b>Price per Square Foot</b>	\$ \$77.68/SQ FT (AS APPRAISED)
<b>Location</b>	GOOD
<b>Age</b>	33A-12 EFF
<b>Condition</b>	GOOD
<b>Total Rooms</b>	7
<b>Bedrooms</b>	3
<b>Baths</b>	2

<b>Appraiser</b>	FRED W. HOYER & GERALD B. HIGGS, ASA
<b>Date of Appraised Value</b>	4 SEPTEMBER 1992

<b>Final Estimate of Value</b>	\$ 135,000
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LAW OFFICE OF  
LOUISE T. KNAUER  
261 EAST 300 SOUTH, SUITE 300  
SALT LAKE CITY, UTAH 84111

FACSIMILE (801) 532 1597  
TELEPHONE (801) 532 6300

CLIENT CO

September 18, 1991

Mr. Gary Thomas Facio  
318 E Street  
Salt Lake City, Utah

Dear Mr. Facio:

I have been retained by your spouse to represent her in this divorce action.

Enclosed please find the Complaint for a divorce which has been drafted to begin divorce proceedings. I have also enclosed an Acceptance of Service, Consent and Waiver for your consideration. Please sign and have this document notarized and return it to me within ten (10) days if you agree to all the provisions contained in the Complaint. If you have any minor changes, you may add them to the Complaint and initial them, and if my client agrees we will proceed with those changes.

By signing the Acceptance of Service, Consent and Waiver you are agreeing that a Decree of Divorce in accordance with the Complaint may be entered, and that the default divorce hearing may take place without your receiving further notice, as it is necessary for only the party filing the action to attend. If you do execute the Acceptance of Service, Consent and Waiver, the divorce may be completed as soon as there is a hearing date available before the Judge, which would be within a couple of weeks.

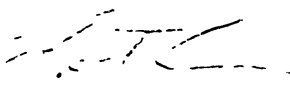
If I do not receive the Acceptance of Service, Consent and Waiver signed and notarized, from you within ten (10) days of the date of this letter, I will be forced to proceed by having you formally served by a constable, at which time you must either retain an attorney or represent yourself, and answer the Complaint within twenty (20) days. We will then have to try to settle the matter, either between us or in Court, all of which can take many months, even years.

Mr. Gary Thomas Facio  
September 18, 1991  
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If you have any questions regarding these documents, please contact me at the above phone number. However, I am obligated to inform you that I represent only your spouse, and therefore cannot give you legal advice. It is also my ethical obligation to suggest that before proceeding you may wish to consult an attorney.

I look forward to hearing from you within ten (10) days.

Sincerely yours,



Louise T. Knauer  
Attorney at Law

LTK/wtc  
Enc.

cc: Beverly Burge

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**MEMORANDUM**

UTAH LEGAL CLINIC  
214 East Fifth South Street  
Salt Lake City, Utah 84111-3204  
Vox: (801) 328-9531 Fax: (801) 328-9533

**From the Desk of: BRIAN M. BARNARD**

**Your Attention is Required**

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- TO: David Larsen
- FROM: BMB
- RE: FACIO
- DATE: May 19, 2000 (2:47 PM)

I have briefly reviewed my files. My recollection is that in ~September, 1991, Gary Facio visited me and brought in a letter and a proposed divorce complaint from Louise Knauer, Esq. representing his wife. I have copies in my file. We discussed his rights, etc. Apparently, that complaint was never filed.

I did not consult with Gary Facio any further in 1991 or 1992. Several years later I was informed that an action for separate maintenance was filed in the Summer of 1992 and that Gary consented to the entry of such a decree. I never met with Gary nor discussed that separate maintenance action with him before the entry of the decree in the 1992 action. The first time that I became aware of that decree and its terms were several years after its entry.

As to fees, to date Gary owes my office \$5,613.75. We can give you an itemization of that, if needed.

Brian M. Barnard

CERTIFICATE OF SERVICE

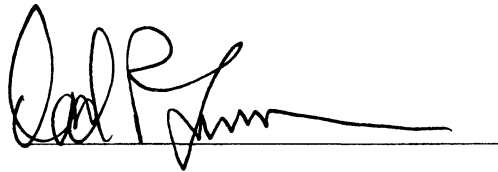
I hereby certify that on the 20<sup>th</sup> day of August, 2001, I hand delivered a copy of the ADDENDUM on each of the following:

Original and 7 copies:

Clerk of the Utah Court of Appeals  
450 South State Street  
Salt Lake City, Utah 84114

2 Copies:

Connie Mower  
43 East 400 South  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Carl R. Johnson", is written over a horizontal line.